Supreme Court, U. S.
FILED
SEP 11 1979
MICHAEL RODAK, JR., CLERK

No. 79-44

In the Supreme Court of the United States

OCTOBER TERM, 1978

PACIFIC INTERNATIONAL RICE MILLS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statute and Executive Order involved 2

Statement 3

Argument 8

Conclusion 11

CITATIONS

Cases:

Abbott Laboratories v. *NLRB*, 540 F. 2d 662 ..... 7, 8

Filmation Associates, Inc., 227 N.L.R.B. 1721 8

Magnesium Casting Co. v. *NLRB*, 401 U.S. 137 10

NLRB v. *Sauk Valley Mfg. Co.*, 586 F. 2d 1127 9

NLRB v. *Tennessee Packers, Inc.*, 379 F. 2d 172, cert. denied, 389 U.S. 958 9

NLRB v. *Universal Camera Corp.*, 179 F. 2d 749, vacated and remanded on other grounds, 340 U.S. 474 9

Pittsburgh Plate Glass Co. v. *NLRB*, 313 U.S. 146 10

Page

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 5, 6

Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 5, 6

Miscellaneous:

29 C.F.R. 102.65(e)(1) 10

29 C.F.R. 102.67(f) 10

29 C.F.R. 102.69(d) 9

Exec. Order No. 11491, 3 C.F.R. 861-875 (1966-1970 Compilation) 2, 7, 8

Section 1 2

Section 3(d) 3, 8, 9, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 594 F. 2d 1323. The decision and order of the National Labor Relations Board (Pet. App. B1-B14) is reported at 228 N.L.R.B. 464. The Board's order denying petitioner's motion for reconsideration (Pet. App. C1-C4) is unreported. The Board's decision and certification of representative in the related representation proceeding (Pet. App. E1-E3) is reported at 223 N.L.R.B. 613. The Board's order denying petitioner's motion for reconsideration of that decision (Pet. App. F1-F2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1979. The petition for a writ of certiorari was filed

on July 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly rejected petitioner employer's claim that it was entitled to a new hearing on its objections to an election won by a local affiliate of the Teamsters Union because the Board's hearing officer was allegedly a member of the National Labor Relations Board Union.

2. Whether the Board properly refused to hold a new hearing based on the employer's untimely allegation that the hearing officer belonged to a labor organization that was affiliated with the Teamsters.

STATUTE AND EXECUTIVE ORDER INVOLVED

1. The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. The relevant provisions of Exec. Order No. 11491, 3 C.F.R. 861-875 (1966-1970 Compilation) are:

> Section 1. *Policy.* (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. * * *
>
> * * * * *
>
> Section 3. *Application.* * * * (d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

STATEMENT

1. Pursuant to a representation petition filed by Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Teamsters"), the Board's Regional Director conducted an election among petitioner's production and maintenance employees at its Woodland, California, facility (R. 6-8).[1] Twenty-five ballots were cast for the Teamsters, and 21 against, with six challenged (R. 9). Petitioner filed timely objections to the conduct of the election, and on July 1, 1975, the Regional Director ordered that a hearing be held on a majority of those objections and on the challenged ballots (R. 11-19). The hearing was conducted by a Board hearing officer on October 29 and 30, 1975; subsequently, the hearing officer issued a report resolving credibility issues and recommending that all objections be overruled, that the Teamsters' challenges to two ballots be overruled because the Teamsters had withdrawn those challenges, and that petitioner's challenges to four ballots

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[1] "R." references are to the formal documents reproduced as "Volume I, Pleadings" in the court of appeals.

be sustained. The hearing officer further recommended that the Teamsters be certified as the employees' collective bargaining representative since the overruled challenges were not determinative of the election (Pet. App. D1-D13). Petitioner filed exceptions to the hearing officer's report and later filed a supplemental brief contending that it was "informed and believe[d]" that the hearing officer "is a member of the National Labor Relations Board Union" ("NLRBU"); therefore, petitioner argued, it was entitled to a new hearing because the hearing officer could not resolve the credibility issues in an impartial manner (R. 134-135).

2. On April 2, 1976, the Board issued its decision and certification of the Teamsters as the employees' collective bargaining representative, adopting the hearing officer's findings and recommendations (Pet. App. E1-E3). In so doing, the Board rejected petitioner's claim that the hearing officer's alleged membership in the NLRBU prevented him from being impartial, noting that (Pet. App. E2 n.2):

> [Presidential] Executive Order 11491, as amended, gives to each Federal employee the right to form, join, and assist labor organizations. We find nothing in the Hearing Officer's alleged membership which might prevent him from being impartial. * * * To the extent that the Employer is of the view that a Board Hearing Officer, or any other employee, cannot be impartial simply because he or she belongs to an employee collective-bargaining association representing Agency employees, or performs management or supervisory duties for the Agency, a position with which we fully disagree and which is wholly unsupported, the Employer should address its contention to the President of the United States or to the Congress. It should be noted, however, that in order to avoid even the possible appearance of bias or prejudice on the part of Board personnel, sec. 3(d) of Executive Order 11491 provides:
>
> > Employees engaged in administering a labor-management relations law . . . shall not be represented by a labor organization which also represents other groups of employees under the law . . . or indirectly with an organization which represents such group of employees.
>
> Furthermore, we have read the record closely and find no evidence of prejudice or bias on the Hearing Officer's part.[2]

Petitioner moved for reconsideration and rehearing, but, on May 19, 1976, the Board denied the motion "as it contains nothing not previously considered by the Board" (Pet. App. F2).

3. Petitioner thereafter refused to bargain with the Teamsters, and on September 22, 1976, the Regional Director issued a complaint alleging that that refusal violated Section (a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 149-151). In response to the General Counsel's contention that petitioner's answer to the complaint raised no issues requiring a hearing, the Board, on November 10, 1976, issued an order to show cause why a motion for summary judgment against petitioner should not be granted (R. 183). Petitioner's response, *inter alia*,

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[2]The Board also noted that (Pet. App. E2 n.2):

> [W]ere we to base our assignment of work on our employees' membership or nonmembership in an employee collective-bargaining association, we would find ourselves in the same unhappy predicament as other employers find themselves when they affect their employees' working conditions or tenure on the basis of their membership or nonmembership in unions. This we will not do.

was to argue for the first time, that a new hearing should be held because it believed that the NLRBU was affiliated with the Teamsters (R. 184-188). Petitioner gave no reason why such an allegation could not have been made during the representation proceeding and submitted no evidence in support of the allegation other than an affidavit from its attorney (stating only, "I am informed and believe that the employee organization to which the Hearing Officer belonged was affiliated with the Teamsters" (R. 190)) and a copy of the Teamsters International Constitution (which made no reference to the NLRBU) (R. 191-284)). On February 28, 1977, the Board issued its decision and order rejecting petitioner's defenses as matters which "were or could have been litigated in the prior representation proceeding,"[3] and therefore finding that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act (Pet. App. B1-B14).

Petitioner filed a motion for reconsideration arguing that it had alleged facts not presented in the representation proceeding—*i.e.*, the charge that the organization of which the hearing officer was allegedly a member was affiliated with the Teamsters. The Board denied this motion, noting, *inter alia*, that petitioner's contention was "untimely," since it was first raised in petitioner's response to the motion for summary judgment following the issuance of the unfair labor practice complaint. The Board explained that petitioner "was able to allegedly discover and argue the issue of the hearing officer's status

[3]Petitioner had denied in its answer to the complaint that the Teamsters had requested, and that it had refused, bargaining, but did not seek to controvert documentary evidence to the contrary appended to the General Counsel's motion for summary judgment. Therefore, the Board found that there had in fact been a bargaining request by the Teamsters, and that it had been rejected by petitioner (Pet. App. B4 n.3). These findings are not contested in this Court.

in a labor organization in the representation proceeding * * *. [I]t has not been shown that the organization's alleged ties to the [Teamsters] was evidence which was newly discovered or previously unavailable" (Pet. App. C3-C4).[4]

4. The court of appeals enforced the Board's order. In so doing, it rejected petitioner's claim that the hearing officer's very membership in a labor organization required his exclusion, noting that "[a] hearing examiner's membership in a union will not ordinarily violate an employer's right to a fair hearing," citing *Abbott Laboratories* v. *NLRB*, 540 F. 2d 661, 665 n.1 (4th Cir. 1976) and Exec. Order No. 11491 Pet. App. A7).[5]

Finally, the court upheld the Board's refusal to hold a hearing on petitioner's belated allegation that the union was affiliated with the Teamsters, agreeing that (Pet. App. A8-A9):

> In the absence of newly discovered or previously unavailable evidence or special circumstances, a [party] in an unfair labor practice proceeding is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. * * * [Petitioner] provides no justification for its failure to raise the question of union affiliation at the time of the representation proceeding when it first objected to the hearing examiner's union membership.

[4]Thus, the Board found it unnecessary to decide whether petitioner's allegation would have warranted a hearing where it "has offered not a single fact in support of its contention" (Pet. App. C4 n.3).

[5]The court further pointed out that petitioner had failed to make any showing that the union of which the hearing officer was allegedly a member was affiliated with any other union, and that "the record clearly evidences [his] impartiality" (Pet. App. A8).

ARGUMENT

Petitioner urges that it was entitled to a de novo hearing in the representation proceeding before a hearing officer not a member of a labor organization and that the Board improperly denied it a hearing in the unfair labor practice proceeding on its belated contention that the hearing officer belonged to a union affiliated with the Teamsters. There is no merit to these contentions, no conflict among the circuits, and no issue raised which merits certiorari.

Petitioner's first complaint (Pet. 6-10) is that the hearing officer could not have been impartial because of his alleged membership in a union of employees of the National Labor Relations Board. Petitioner cites no authority for this proposition. While the Board will disregard the results of a hearing where the conduct of the hearing officer or administrative law judge displays evidence or appearance of bias (see, *e.g.*, *Filmation Associates, Inc.*, 227 N.L.R.B. 1721 (1977)), it will not presume bias merely because the trier of fact happens to be a member of a labor organization unaffiliated with any of the parties. That position is clearly correct. Cf. *Abbott Laboratories* v. *NLRB*, 540 F. 2d 662, 664 (4th Cir. 1976), where the court upheld the Board's rejection of a claim "that the Board's hearing officer should have disqualified himself because his possible membership in a union which admittedly had no interest in the litigation before him might nevertheless have led him to lack objectivity in judging the conduct of a Board agent who was a member of that union." Moreover, as noted by the Board (Pet. App. E2 n.2), Exec. Order No. 11491, which authorizes membership in labor organizations, explicitly states at Section 3(d) that federal employees dealing with labor-management law shall not be represented by organizations affiliated with unions operating under such

law. Thus, the Executive Order takes into account the potential problem raised by union membership of employees of the Board and effectively eliminates it. Here, as the court of appeals recognized (Pet. App. A8), petitioner made no allegation or showing in the representation proceeding that the NLRBU had any affiliation with the Teamsters or any other labor organization having dealings under the National Labor Relations Act. Therefore, the Board was presented with no reason to retry the representation case.[6] There is therefore no merit to petitioner's assertion (Pet. 11-13) that the Board's procedure vitiated the significance of Section 3(d) of the Executive Order. Petitioner simply made no timely, supported allegation to raise any issue thereunder.

Nor is there merit to petitioner's contention (Pet. 11-13) that the Board improperly refused to grant a hearing on its belated assertion, in response to the motion for summary judgment in the unfair labor practice proceeding, that the NLRBU was affiliated with the

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[6]It is well settled that absent some evidence supporting an objection that would indicate a basis for reversal, no hearing is required on such objection. See 29 C.F.R. 102.69(d); *NLRB* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (6th Cir.), cert. denied. 389 U.S. 958 (1967); *NLRB* v. *Sauk Valley Mfg. Co.*, 486 F. 2d 1127, 1133 (9th Cir. 1973).

Contrary to petitioner (Pet. 13-14), bias is not indicated because the hearing officer credited the testimony of Daniel Barrus. Where a witness may have been untruthful or confused on a point not relied upon for decision, the trier of fact need not discredit the witness' relevant testimony, since the trier need not believe all of a witness' testimony before he may believe any of it. *NLRB* v. *Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951). In any event, the court of appeals, based on an assessment of the record set out in its opinion (Pet. App. A6), found that "substantial evidence in the record supports the reasoning underlying [the hearing officer's] credibility determination" (Pet. App. A5).

Teamsters in violation of Section 3(d) of Exec. Order No. 11491. Petitioner made no showing that the allegation was based on evidence not available to it at the time of the underlying representation proceeding. Therefore the Board properly refused to consider the allegation, since an employer may not raise as a defense to a charge of unlawfully refusing to bargain with its employees' certified representative any matter it could have litigated (but did not) in the certification proceedings. See 29 C.F.R. 102.65(e)(1) and 102.67(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 161-162 (1941).[7]

[7]In any event, petitioner provided no evidence whatsoever to support its claim; thus, even if this defense had been timely, Board rejection without a hearing would have been warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

DOJ-1979-09